

ORIGINAL

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In Re: Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations

(Dalhart and Perryton, TX)

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MM Docket No. 05-144
RM-11189

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DEC 29 2005

To: The Secretary of the Commission

Attention: The Assistant Chief, Audio Division, Media Bureau

Federal Communications Commission
Office of Secretary

REPLY OF RADIO DALHART
TO
OPPOSITION OF PERRYTON RADIO, INC.

Radio Dalhart respectfully submits its reply to the "Opposition of Perryton Radio, Inc." filed on November 19, 2005.¹ As demonstrated herein, Perryton Radio's Opposition should be disregarded in its entirety or, in the alternative, deemed immaterial and irrelevant.

1. **Threshold Procedural Issue** – On March 23, 2005 the Commission issued its *Notice of Proposed Rulemaking and Order to Show Cause* ("NPRM") in this matter. Therein, it afforded Perryton Radio an opportunity to show cause, no later than May 10, 2005, as to why the license for its station KEYE-FM should not be modified to specify Channel 248C3 in lieu of Channel 241C3.

2. Perryton Radio was utterly silent until November 8, 2005, when it filed a "Motion for Temporary Stay of Proceedings" which did not even allude to, much less attempt to satisfy, any of the well-established requisites for stay;² rather, it only claimed to have never received any prior

¹ As noted in Paragraphs 1 and 2, *infra.*, the procedural status of this case has become somewhat blurred. We respectfully submit, however, that Perryton Radio's subject "Opposition," despite its gross untimeliness, is in the nature of initial comments, to which Radio Dalhart should have the right to file the instant reply.

² See: *Virginia Petroleum Jobbers Ass'n. v. Federal Power Commission*, 259 F.2d 921 (DC Cir 1958), and followed by the Commission (e.g., *CATV Rules*, 34 FCC 2d 165, 166 (1972)).

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notice of this matter, due to an alleged change in its mailing address. In a November 10 opposition, Radio Dalhart noted that Section 1.5(a) of the Commission's rules obligates licensees to keep the Commission apprised of their current address, that Perryton Radio had failed to document that it had complied with the rule, and that the Commission's service of its *NPRM*, and Radio Dalhart's service of its initial comments, to the address on file for Perryton Radio were legally sufficient.³

3. By failing to observe required Commission procedures, Perryton Radio forfeited its right to participate in this proceeding. Consequently, its subject Opposition is grossly untimely and should be disregarded in its entirety. Even so, the various points raised in the subject Opposition present no cognizable basis upon which to deny the relief sought in the *NPRM*.

4. **Disruption to KEYE Listeners** – The first claim raised by Perryton Radio is that its listeners might be confused, and perhaps temporarily lost, while attempting to find its new frequency. Even if such concerns were true⁴ they are immaterial. While the Commission recognizes that changing the channels of existing stations creates a potential for temporary

³ On December 9, 2005 Perryton Radio filed a "Preliminary Response and Motion for Additional Time" to which it ultimately helped itself by filing its subject Opposition on December 19. In any event, by filing a substantive objection to its proposed change of frequency by means of the subject "Opposition" Perryton Radio is entitled to no further opportunity to show cause why its license should not be modified. In any event, the relief sought in its "Motion for Temporary Stay of Proceedings" has become moot and need not be addressed any further.

⁴ At ¶5 of its attached Declaration of Sharon Ellzey, Perryton Radio concedes that it already had changed frequency. According to FCC records, that was in 1999 (*see* BPH-19990518IH and BL-19990927ABT). Apparently, its listeners were able to cope with that change. With digital tuning now more prevalent than in 1999, consumers are apt to deem any frequency change of equal magnitude, and so, if anything, the proposed modification should present fewer problems nowadays than had the 1999 channel change. Perryton Radio claims that many of its listeners use analog tuners, yet KEYE-FM will not be jumping from one end of the dial to the other but rather merely shifting from 96.1 to 97.5 mHz, so such listeners should have little trouble finding the station in the same region of their dial as before.

Perryton Radio further asserts that due to similar formats, its listeners would not only lose track of KEYE-FM but would be "hoodwinked into listening to KXIT [since] that station's broadcasts ... would likely be audible in a substantial part of KEYE's current listening area." (Opposition at p. 2.) Attached hereto is a map prepared by Radio Dalhart's owner (who is an experienced engineer) depicting the stations' existing and proposed coverage areas. In fact, the protected service contours will be over 40 km apart. Indeed, according to the 2002 Arbitron survey of Hansford County (between the stations' coverage contours), KEYE-FM had a *cume* (*ie*: all adults who listened at all for any part of a week) of a mere 300. In all likelihood, most of those were in the more populous area near Spearman, which lies just outside KEYE-FM's protected contour and far distant from KXIT, and thus hardly would be in jeopardy. Moreover, with reference to the same map, it is hard to credit Ms. Ellzey's contention that her listeners in Canadian are vulnerable (Declaration, ¶11), as it lies 172 km from KXIT's transmitter site and 96 km from KXIT's contour.

disruption to the stations' listeners, it has consistently held that this disruption of service does not outweigh the public interest benefit of providing service to additional population. *See, e.g., Churchville and Luray, Virginia*, 5 FCC Rcd 1106 (1990), *recon. den.*, 6 FCC Rcd 1313 (1991). The Commission has held that this is particularly true in a case such as this where grant of a counterproposal will result in a station upgrade and an expansion of its service area. *See, e.g., Castle Rock, Colorado Springs, Frisco and Salida, Colorado*, 7 FCC Rcd 7668 (1992) at ¶8. Indeed, while opponents routinely raise such factors, the Commission routinely disregards them. *See, recently, Connersville, Madison and Richmond, Indiana*, DA 05-3027 (released November 25, 2005) at ¶¶5 and 18. Consequently, the matters raised by Perryton Radio are hardly unique but rather are the natural consequence to be routinely expected in the course of facility improvements that otherwise serve the public interest.⁵

5. **The KXIX Upgrade** – Perryton Radio next asserts that the upgrade and consequent service increase proposed in the *NPRM* is insufficient to outweigh the slight net amount of gray area that will be created. Radio Dalhart has already addressed this matter in its Comments, wherein it demonstrated that the gray area is of a magnitude deemed *de minimus*.⁶ The result is that it no longer is considered under the second of the FM allotment priorities but rather the fourth and therefore is merely weighed against the overwhelmingly greater expansion of service that will result from implementation of the *NPRM* proposal.⁷

⁵ At the conclusion of this section of its argument, Perryton Radio cites *Sells, Arizona*, 19 FCC Rcd 22459 (Media Bureau 2004) at ¶¶8-9 for the proposition that “the public has a legitimate expectation that existing service will continue.” Yet, that very case stated the general proposition in the context of a loss of service **not** being dispositive, but rather merely a factor to be weighed against other service benefits (as will be the case here).

⁶ *See* Radio Dalhart's May 9, 2005 Comments at ¶4. *See, also, Wallace, Idaho and Bigfork, Montana*, 17 FCC Rcd 2243 (2002), *rev. den.* FCC 04-184 (August 5, 2004) at ¶ 5 (creation of gray area of 150 population deemed *de minimus*).

⁷ Perryton Radio cites *Greenup, Kentucky*, 6 FCC Rcd 1493 (1991) at ¶ 13 for the proposition that improved service to well-served areas is inconsequential. The relative weight to be given to such improvements is already taken into account by considering such gains under the fourth priority. Nonetheless, the “rapidly diminishing value to consumers of each additional radio signal” cited by Perryton Radio is hardly a general principle, but rather arose in *Greenup* only in the specific context of a “service value index” in which the population within each area is divided by the number of signals received as an objective means to compare competing proposals. *Id.*, at ¶13. The Commission confirmed limiting this tool to such comparisons in *Rocky Mount, North Carolina*, 8 FCC Rcd 6206 (1993) at ¶ 13. In any event, even were competing proposals under consideration here, it is the obligation of a party

6. Perryton Radio further attempts to diminish the public interest in the *NPRM* proposal by contending that the gain will cover Amarillo suburbs. Radio Dalhart never claimed that its proposed gain area was less than well served, yet the expansion of service to such areas remains in the public interest, and for that reason is considered under the fourth allotment priority. Even so, reference to the attached map demonstrates that it is misleading to characterize the service gains as intended merely to add another service to Amarillo. Had that been Radio Dalhart's aim, it would have proposed relocation closer to Amarillo. Indeed, its proposed service contour does not even include Amarillo itself; rather, it is evident that the communities of Vega (2000 Census population: 936), Fritch (2,235), Stratford (1,991) Stinnett (1,936) and Borger (14,302), all distant from Amarillo, will be primary beneficiaries.

7. **Reimbursement** – Next, Perryton Radio questions Radio Dalhart's ability to reimburse its legitimate expenses in effecting the channel change.⁸ The entire basis cited for this concern is paragraph 23 of Ms. Ellzey's Declaration, which reads in its entirety as follows:

I have reason to believe that Radio Dalhart may be unable or unwilling to pay these costs. I have seen no evidence that Radio Dalhart has the financial wherewithal to sustain these expenditures, and I believe to the contrary that it may not.

Ms. Ellzey's concerns are purely speculative. Paranoia notwithstanding, she cites no facts to support her fears that Radio Dalhart is destitute.⁹ In any event, Perryton Radio cites no precedent for its request that the FCC require any amount, whether fantastic or real, be escrowed or that proof

seeking to invoke use of the index to present relevant calculations, which Perryton Radio has failed to do.

⁸ Although irrelevant, its estimate of "\$20,000 to \$50,000 ... on the purely technical side" (Ellzey Declaration at ¶18), which somehow grows to "likely in excess of \$50,000, and perhaps twice that" in its Opposition, is grossly exaggerated. For example, Ms. Ellzey claims that she would have to "disconnect the transmitter, ship it to Boston, have it re-tuned, ship it back and re-connect it" over "roughly two or three weeks" (Declaration at ¶19), whereas in fact the station's Nautel transmitter is a relatively new solid-state model that is readily tunable in the field. Indeed, it is well established that reimbursement obligations extend only to reasonable costs and so unnecessary transmitter shipments, together with claims for lost profits due to resulting excessive down-time, would fall outside Radio Dalhart's responsibility. See, *Leitchfield, Kentucky*, 8 FCC2d 159 (1967) at ¶ 12.

⁹ On the contrary, Perryton Radio's professed beliefs are belied by its actions – it currently is suing Radio Dalhart for hundreds of thousands of dollars, a clearly wasted effort if Perryton Radio truly believed that the defendant was judgment proof. See, Cause No. 11,268 in the District Court, Ochiltree County, Texas, 84th Judicial District.

of capacity be produced, and with good reason – the FCC has never so ordered.¹⁰ Perryton Radio has utterly failed to make a convincing case for establishing new and extraordinary precedent here.

8. **The Alleged Non-Necessity of KEYE-FM's Migration** – In a sadly similar vein, Perryton Radio concludes with a brief, unsupported request for equally unprecedented relief – that the Commission should require that Dalhart Radio explore alternative upgrades that presumably would avoid a need to change KEYE-FM. Here, too, Perryton Radio cites no prior instance in which such relief was granted, as indeed there is none. On the contrary, the appropriate vehicle for alternative technical suggestions is through counterproposals, of which none was filed in this proceeding – not by Perryton Radio nor anyone else.¹¹

9. **Conclusion** – As demonstrated herein, Perryton Radio has failed to demonstrate any cognizable reason why the relief sought by Radio Dalhart should not be granted. Specifically, Perryton Radio has utterly failed to justify the grossly late filing of its response to the Commission's order to show cause which was properly served upon its address of record, its fears of listener disruption are nothing extraordinary but rather the natural and expected consequence of any channel change which all licensees are required to tolerate, the slight creation of gray area is overwhelmed by the magnitude of service increases, including to several significant communities, and Perryton Radio has failed to assert any basis for the extraordinary relief it seeks based solely upon unstated fears of reimbursement problems for its legitimate channel-change-related expenses, nor for its suggestion that the Commission consider alternate proposals that it has not even proffered.

10. Consequently, the relief proposed in the *NPRM* should be granted. Radio Dalhart restates its present intention to promptly apply for and construct facilities on the channel it has

¹⁰ The sole case Perryton Radio cites – *Columbus, Nebraska*, 59 RR2d 1184 (1986) – stands for the precise opposite of the proposition it claims. There, a petitioner was **not** required to demonstrate financial ability, but the Commission merely allowed that were an as yet-identified applicant for a wholly new station to become responsible for reimbursing moves by **five** existing stations, there might be reason for concern.

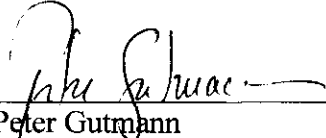
¹¹ It is well established that an alternative channel may be considered in the context of a rulemaking, but only to resolve conflicts between proposals or where one of the parties suggests a channel of equivalent class. See, *Chester, Shasta Lake City, Alturas, McCloud, Weaverville, and Shingletown California*, 13 FCC Rcd 8549 (1998) at ¶ 18. Here, even were Perryton Radio to have acquired party status, Radio Dalhart's proposal is the only one under consideration and Perryton Radio has not proffered any alternative channel that might meet its concerns while preserving the benefits sought by Radio Dalhart.

requested herein, if allotted.

Respectfully submitted,

RADIO DALHART

By: _____


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December 29, 2005


DECLARATION UNDER PENALTY OF PERJURY

George Chambers states under penalty of perjury that the following is true and correct:

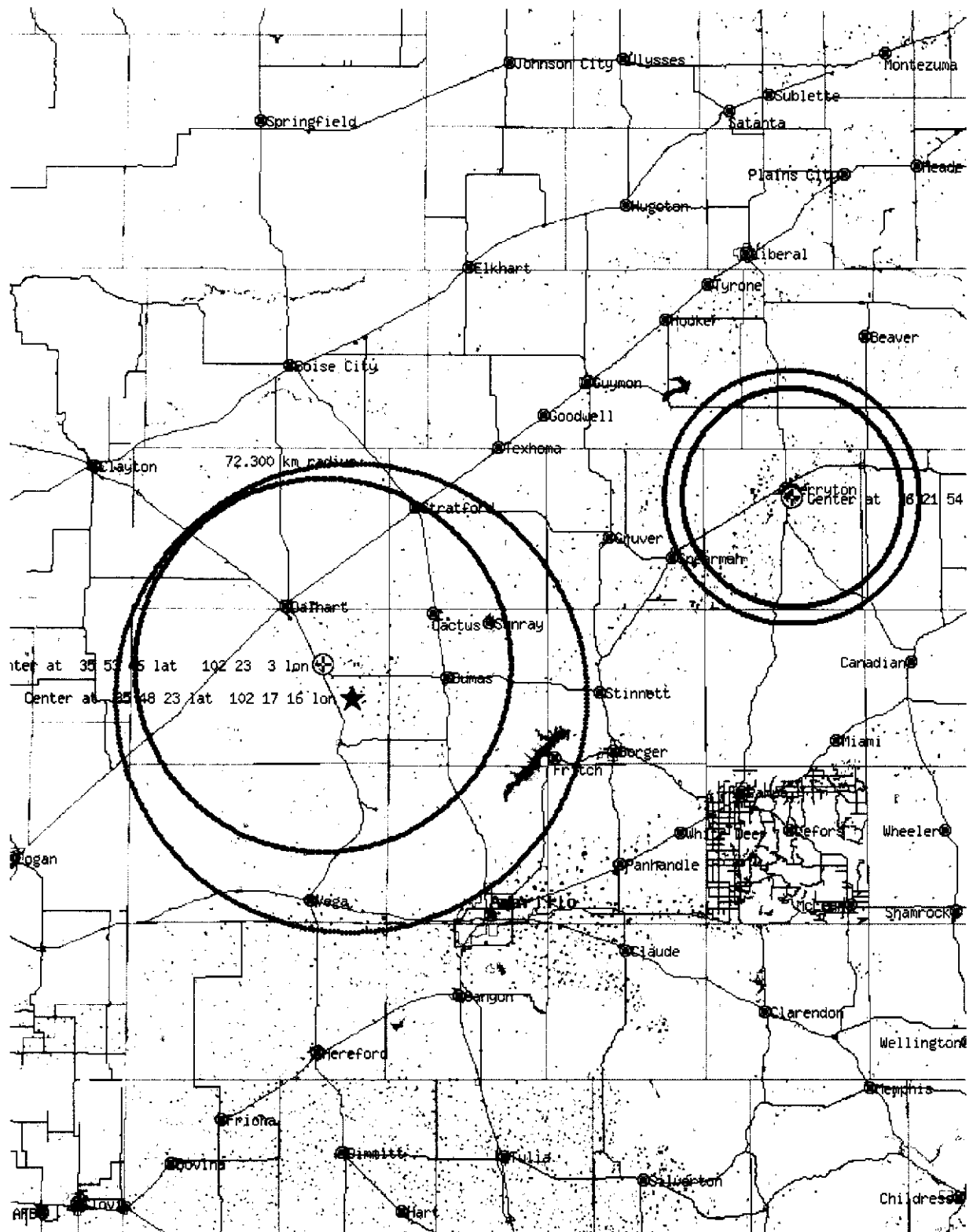
1. I am President and the sole owner of Radio Dalhart, licensee of stations KJTT and KXIT-FM, Dalhart, Texas, and the proponent in FCC rulemaking proceeding RM-11189 (MM Docket No. 05-144) in which we seek to upgrade the service of KXIT-FM. I earned my First Class License in 1976 (later converted to General Class) and have acquired substantial engineering experience, which I have applied in planning our KXIT-FM upgrade.

2. I have read the December 29, 2005 "Reply of Radio Dalhart to Opposition of Perryton Radio, Inc." and the facts stated therein are true and correct to the best of my personal knowledge and belief.

3. I prepared the map attached to our reply using FCC circle plots on the Tiger Census Map program.


George Chambers

December 29, 2005

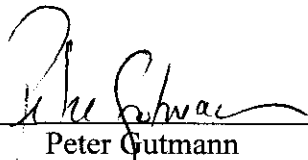


CERTIFICATE OF SERVICE

I, Peter Gutmann, an attorney in the law firm of Womble Carlyle Sandridge & Rice, PLLC, do hereby certify that I have caused copies of the foregoing "Reply of Radio Dalhart to Opposition of Perryton Radio, Inc." to be mailed to the following by first-class United States mail, postage prepaid on December 29, 2005:

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